IN THE

Supreme Court of the United States

October Term, 1945

No. 839

JAMES MAXFIELD and HUGH WILTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 840

HUGH WILTON and JAMES MAXFIELD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

James Maxfield and Hugh Wilton pray that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Ninth Circuit, entered in the above causes on December 14, 1945 [R. 1047-48], affirming the judgments of the District Court of the United States for the District of Nevada.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit [R. 1036-46] has not yet been reported. The cases were consolidated for trial and remained consolidated on appeal.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on December 14, 1945 [R. 1047-48]. Petitioners' application for a rehearing was denied on January 14, 1946 [R. 1049]. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended. See also Rule XI of the Criminal Appeals Code, promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether petitioners, who were on the cash receipts and disbursements basis and, admittedly, received no taxable income during 1937, but sustained a net loss for that year,[1] could be convicted for attempted evasion of income taxes for 1937 under the third count of each indictment?

2. Petitioners were jointly named in each of two separate indictments. Each indictment included a count charging what is conceded[2] to be the same alleged crime of conspiracy to evade income taxes. Petitioners were prosecuted under both indictments, convicted of the same alleged conspiracy offense in each case, and by separate

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[1]Prosecuting Revenue Agent's testimony, R. 482-483.

[2]Circut Court's opinion, R. 1039. In its brief (p. 14) in the Court below, the Government also accepted this view.

judgments each was sentenced to one year's imprisonment on the conspiracy count in the one case, and to one year's imprisonment and a $5,000 fine on the similar count in the other case. The Circuit Court, which treated the two criminal prosecutions as if they were predicated on a single indictment containing two similar conspiracy counts, permitted both sentences to stand, and concluded there was no prejudice because they were within the maximum punishment prescribed for a single conspiracy.

Did the Circuit Court err in sustaining both conspiracy convictions and unequal penalties and double punishment for the single offense?

3. Was the Circuit Court's failure to dispose of all errors assigned by petitioners prejudicial and in violation of the pronouncement of this Court in *Maryland Casualty Co. v. Jones,* 279 U. S. 792?

4. If petitioners, as held by the Circuit Court [Op. Point 4, R. 1041-44], adopted incorrect theories of tax treatment with reference to the items of $134,000, $97,000, $86,000 and $93,000, do such claimed mistakes constitute sufficient evidence to sustain their convictions for the crimes charged, in the absence of a final determination of the precise questions in proceedings still pending in the Tax Court of the United States?

5. Should the rulings of the trial court (1) in admitting and excluding certain evidence, (2) in refusing to give certain instructions requested by petitioners and (3) in denying petitioners' motions for directed verdicts, be sustained?

Statutes Involved.

Revenue Act of 1934 c. 277, 48 Stat. 680:

SEC. 145. PENALTIES.

* * * * * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

Section 145 (b) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is identical with Section 145 (b) of the Revenue Act of 1934.

* * *

United States Code, 1940 Ed.:

Sec. 88 (Criminal Code, Section 37):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (Mar. 4, 1909, ch. 321, Sec. 37, 35 Stat. 1096.)

Statement.

Two separate criminal prosecutions are involved, based on two indictments of four counts each, charging each petitioner with evasion of income taxes for the calendar years 1935, 1936 and 1937, respectively, in the first three counts, and with conspiring with each other to evade their respective taxes for 1933 to 1937, both inclusive, in each fourth count. Indictment No. 10,455 deals with the income tax liabilities of Maxfield and No. 10,456 with those of Wilton. It is conceded, however, that the fourth count of each indictment charged the same identical alleged criminal conspiracy. Both petitioners are named in each indictment. The cases were tried together at Carson City, Nevada, May 18 to June 4, 1943. General verdicts of guilty as charged were returned on all counts of both indictments. In separate judgments in each case, each petitioner was sentenced to serve one year in a county jail on each of the four counts of each indictment. In addition, each petitioner was fined $5,000 on each of the four counts of Indictment No. 10,455. All eight one-year jail sentences were to run concurrently.

The undisputed facts shown by the evidence are as follows:

In October, 1932, petitioner Maxfield entered into a transaction with owners of certain gold mining claims in Clark County, Nevada, as the result of which what is known as the Chiquita mine was developed and put into production by July, 1936 [R. 289, 747-748, 762]. At first Maxfield had no one associated with him [R. 798]. Later, one Vogel became associated with him for a brief time. Maxfield then purchased Vogel's entire interest in all matters pertaining to the Chiquita mine [R. 799]. Shortly

thereafter Maxfield employed petitioner Wilton to assist him in the matter of securing funds and putting the mine on production, Wilton to receive as his compensation in lieu of salary 50% of Maxfield's net profits if, as and when realized, and no other consideration.[3]

In December, 1932, petitioner Maxfield executed and filed with the proper County Clerk in Nevada, in compliance with the laws of that state, a certificate of fictitious name [R. 784-789], reciting in part as follows [R. 785]:

> "I, the undersigned, James Maxfield, am the sole owner and proprietor of said business, and I am the only person interested in, conducting and carrying on such business and intending to do so."

Maxfield at all times thereafter operated under the foregoing certificate. It was stipulated [R. 343-344] that this certificate was actually filed in 1932 and that up to the time of trial there was nothing in any file in the name of Chiquita Mine Syndicate in Clark County or elsewhere making any change in it.

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[3]The District Court refused to allow either petitioner to relate a conversation occurring in the latter part of October or in November, 1932. [R. 799-849.] The rejection of this testimony was assigned as error. [R. 1014-1015.] Petitioners offered to prove the following substance of this conversation [R. 799-800]: That petitioners stated to each other that Maxfield would operate under the fictitious name of Chiquita Mine Syndicate, and under a certificate that was filed in the office of the Recorder of the County in which the mine was located; that all assets of all transactions would belong to said Chiquita Mine Syndicate to be used in the furtherance of the business of the mine; that Wilton would receive as his compensation 50% of the net profits, if, as and when realized, and no other consideration; and that at no time was there to be any co-partnership or joint venture between them, but that the relationship of principal and agent would exist.

As the result of Maxfield's negotiations with the miners, the Chiquita Mining Company, Ltd., a Nevada corporation, was formed [R. 289]. Late in 1932 the miners conveyed fourteen mining claims to this corporation [R. 291]. In consideration for the conveyance of the fourteen claims, 250,000 shares of its authorized one million shares of capital stock, of a par value of $1.00 each, were issued to the miners, and another 250,000 shares were issued to Maxfield as the Chiquita Mine Syndicate. The Chiquita Mine Syndicate agreed to purchase from the miners their 250,000 shares for $87,500 which was actually paid them [R. 289-290]. The remaining 500,000 authorized shares were to be issued to Maxfield upon his furnishing to the corporation $75,000 with which to develop the mine and place it on production.

The 250,000 shares issued to Chiquita Mine Syndicate were to be placed in escrow to be delivered to Maxfield at the rate of one share for every two shares purchased by him out of the block of 500,000 shares mentioned. Later this arrangement was changed so that one share of stock out of the block of 250,000 shares was released to the Chiquita Mine Syndicate for every share of stock purchased by Maxfield from the miners [R. 289-291]. The corporation's stock records, in evidence, show all one million shares ultimately were acquired by Maxfield either under his own name or as the Chiquita Mine Syndicate. None were ever acquired by or issued in the name of petitioner Wilton [Pltf.'s Ex. 25, see R. 95].

When $75,000 was fixed as the purchase price for the block of 500,000 shares, the miners believed this amount would be sufficient to put the mine on production. However, it was understood that Maxfield would provide any

additional money needed to put the mine on production if such sum was insufficient [R. 292]. Maxfield definitely agreed with the miners that regardless of the amount of money necessary to develop the mine and put it on production, he would complete development, construct a mill and put the mine on production. The miners "would not have entered into any transactions whatsoever with Mr. Maxfield if he had not definitely agreed to put the mine on production no matter what the cost" [R. 724-725]. The same agreement was made by Maxfield with all persons who bought Chiquita Mining Company, Ltd. stock from him, including Dr. and Mrs. Benton N. Colver.[4]

Maxfield specifically agreed with Dr. and Mrs. Colver that the balance ($97,459.47) of a certain fund entrusted by them to him would be devoted by Maxfield to placing the Chiquita mine on production [R. 781-782]. These agreements of Maxfield with the miners, Chiquita stockholders and Dr. and Mrs. Colver were relied upon by petitioners to show that Maxfield received and held (among other amounts) said sum of $97,459.47 in trust for the stated purpose, and that such funds never became subject to his absolute ownership or dominion. Indisputably, he performed completely the obligation of this trust. He not only used this $97,459.47 for that purpose, but actually devoted $134,399.26 in putting the Chiquita mine on production, which sum included the $97,459.47 and an

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[4]However, the District Court, upon objection by Government counsel, rejected petitioners' offer to prove by Maxfield [R. 776-777]: ". . . that Maxfield promised and assured each and every person who bought stock in the Chiquita mine that he personally would furnish whatever money was necessary to put the mine on production, and that in pursuance of these successive promises made by him, he actually did advance (the) sum of $134,399.26." The Court's ruling was assigned as error. [R. 1014.]

additional $36,939.79 received from other stockholders and charged with the same trust. Of the total sum, $33,-261.26 was used for the agreed purpose in 1935 and the remaining $101,138.00 in 1936. "Every cent of that money was spent either on labor or materials in putting (the) mine on production" [R. 728]. (Note: Any recognition by the Circuit Court of the undisputed existence of Maxfield's completely performed agreements with the miners, the Colvers and the other stockholders, with their consequent legal effect, is entirely absent from its opinion.)

The foregoing $97,459.47 constituted the remainder of a fund of $250,395.15[5] which Maxfield received from the Colvers in 1935 and 1936 for the purpose of unwatering and developing the Herman mine in Placer County, California, in which mine both the Colvers and Maxfield were interested. Maxfield actually did use $152,768.68 of that $250,395.15 fund for the purpose of opening, unwatering and developing the ore body of the Herman mine [R. 750, 754-755, 757-758, 781-782]. The revenue agent upon whose testimony the convictions depend treated, rightfully, the $152,768.68 spent by Maxfield in unwatering the Herman mine in fulfilling his agreement with the Colvers as not constituting income to petitioners. But the agent and both courts treated the $134,399.26, spent by Maxfield in placing the Chiquita mine on production, in fulfillment of his same agreement with the Colvers, the miners and other stockholders, as taxable income reportable by petitioners. Maxfield treated both items alike—as moneys received by him charged with a trust.

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[5]This fund constituted the proceeds from sales in 1935 and 1936 of Kellogg stock transferred by the Colvers to Maxfield in those years.

Another item ($86,000) of alleged income to petitioners, referred to by the Circuit Court [R. 1043], consisted of real and personal property acquired by Maxfield in exchange for Chiquita stock. The revenue agent treated certain Battle Creek Gas Company stock thus acquired in 1933 as having "no readily realizable market value" in that year. He set up a net profit thereon in 1935 and 1936 when the Battle Creek stock was sold.[6] By this method of treatment of property having "no readily realizable market value" when acquired, the prosecuting revenue agent charged petitioners with a net profit of $44,373.27 for 1935 [R. 440]. (Obviously, the agent used the words "no readily realizable market value" as indicating that there were no "willing buyers" for the Battle Creek stock [R. 438-39].)

Maxfield treated other real and personal property received by him in 1935 in exchange for Chiquita stock in the same manner as he and the revenue agent treated the Battle Creek Gas Company stock [R. 548-549]. Without contradiction it was shown that this property, although claimed by the agent to have a total fair market value of $86,708.13 in 1935 when received, in fact had

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[6]The revenue agent testified as follows: "My investigation of the facts disclosed that the stock of the Battle Creek Gas Company had *no readily realizable market value* in 1933; therefore, no profit or loss was computed on the transaction during the year 1933, when they gave Chiquita Mining Company shares for shares of Battle Creek Gas Company." [R. 437-438.] "Q. . . . according to your general rule in a case of an asset like that, which had *no readily realizable fair market value,* or in other words a frozen asset like that, when received, should be put over to the year that it was actually disposed of and the cash received? A. It should be reported in the year when they received the cash. Q. And that would conform with the general rule, as you said, if they did it that way? A. Yes, sir." [R. 550.]

no readily realizable market value at that time owing to the depression and moratorium in California where the property was located [R. 939-941, 800-801]. In addition, petitioner Wilton, after qualifying as a real estate broker, was not allowed to testify concerning whether he had made repeated attempts to sell such property, and whether in his opinion any of those properties could have been sold during the year in which they were acquired for any substantial part of the amounts which were claimed by the revenue agent to constitute their fair market value [R. 857-858; Assignments XLVIII, Pars. 3, 4, 5; R. 1015-16]. We challenged these rulings but the Circuit Court made no reference thereto in its opinion.

In 1936, Maxfield purchased other real property for a cash consideration payable in monthly instalments extending over the lifetime of the respective grantors thereof [R. 443-450]. This concerns the $93,000 item discussed by the Circuit Court [R. 1044]. We feel certain the government will make no contention that these transactions involved anything other than the purchase by Maxfield of real property. The aleged "fair market value" of the property was $93,855.19 [R. 444-445, 446-447, 448-450]. The total monthly purchase instalments agreed to be made therefor by Maxfield amounted to $797.17 [R. 443-444, 445, 447, 449]. In computing a profit on these transactions as of the date of acquisition of these properties, the revenue agent alloved Maxfield a cost basis of only $305.71 [R. 663-664, 665], which was less than one-half of the amount of the total instalments of $797.17 for one month. Thus, the revenue agent determined that petitioners had received a net profit of $93,551.45 in 1936 when the real property was conveyed to Maxfield, out of

the total alleged fair market value of $93,857.19 [R. 662-665]. We challenge the Circuit Court's affirmance of the treatment of this item.

Each count of both indictments charged petitioners with having maintained inadequate and incomplete books and records reflecting their incomes and sources thereof and with having concealed the same from all proper officers of the United States as to all years involved. The undisputed evidence shows: On March 9, 1939, the prosecuting revenue agent arranged by telephone for a conference with Maxfield. On the same day, in such conference, Maxfield agreed to permit an examination of all matters relating to tax liabilities for the years involved. He further agreed to have executed and delivered to the revenue agent on the following day written waivers extending the statutory period of limitations (which would have expired in six days) for the assessment of any civil tax liabilities for 1935 with reference to both petitioners and their wives. This was done. Immediately thereafter, the agent left for the East. On his return, in October, 1939, he commenced his examination [R. 341-342, 674-675].

Arrangements promptly were made by petitioners to set aside a room for the agent in Los Angeles [R. 675]. Government witness Claudia Taylor, who had been employed as bookkeeper by petitioners in 1935 and 1936 [R. 297], was reemployed by them in October, 1939, for the specific purpose of assisting the revenue agent "in obtaining the information that (he) needed" [R. 675-676, 686]. She assisted the agent during his entire examination from October, 1939, to May, 1940 [R. 675-676]. The only information the agent was unable to obtain from peti-

tioners involved certain real estate transactions with Mrs. Houghtelin and Mrs. Reding [R. 553-554], and the uncontroverted evidence shows that the agent was advised by petitioner Wilton that the records concerning the 100 parcels of real property, among which were included the Houghtelin and Reding properties, were in the possession of a trustee of the United States District Court at Los Angeles. Wilton offered to get whatever information the revenue agent desired from such records but the agent said that was not necessary, he would go himself [R. 945-946].

Petitioners maintained records containing original entries[7] of all transactions. The records consisted of, among other things, a cash journal, cancelled checks, check stubs, memoranda from brokerage houses, stock purchase agreements and memoranda of that kind and bank statements from various banks [R. 342]. The revenue agent also examined, in connection with petitioners, the books and records of the Chiquita Mining Company, Ltd. [R. 519-520]. The bookkeeper, testifying for the Government, stated that the records were accurately kept by her and that she reconciled the bank statements each month and each was perfect [R. 300-301]. No single item of cash income was shown not to have been reflected by the books kept by petitioners.

Despite the Circuit Court's observation [Op. R. 1045] with reference to the acquisition of property in exchange

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[7]The revenue agent testified that the check stubs, cancelled checks and the deposit slips are what are called the original and primary entries, and that all entries therefrom into other books are secondary entries [R. 576]. He further testified that he verified the secondary entries in this case by checking with the original entries [R. 576-577].

for mining stock that "On this phase the government auditor testified that nothing in appellants' books indicated that they owned any property," the evidence incontrovertibly and conclusively shows that all records disclosing full information concerning the 100 parcels of property included in the $86,000 and $93,000 items mentioned above were in the possession of R. M. Crawford, a trustee of the United States District Court at Los Angeles, and that the government auditor was so informed.[8]

There is no evidence of any kind in the record tending to establish the charge of concealment "from any and all proper officers of the United States" of the incomes of petitioners, the sources thereof, "and all books and records reflecting" the same [See Indictment, R. 2-55]. Concealment was charged as to all years, 1933 to 1937, both inclusive, and in each count of both indictments.

The Collector of Internal Revenue for the District of Nevada, Douglass, testified [R. 709] that "these defendants [petitioners] never at any time to my knowledge concealed or caused to be concealed from my office any facts relative to their income for the years 1934, 1935, 1936 and 1937." Petitioners' returns were filed in Nevada for the years 1934 to 1937, both inclusive, and in California for 1933.

Petitioners assigned as error the rejection of testimony sought to be elicited from Douglass to establish that Maxfield attempted in every way to cooperate with Douglass' office [R. 708; Assignment XL, R. 1011].

The chief field deputy collector, Mooney, for Nevada, was offered by petitioners as a witness to establish that

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[8]The Government auditor made no attempt to examine these records and gave no explanation for failure to do so.

at no time during the years 1933 to 1937, both inclusive, did petitioners ever conceal or attempt to conceal any information from the witness in his official capacity, or from any other person in that department [R. 712]. The District Court excluded this testimony and error was assigned with respect thereto [Assignments XLI, XLII, R. 1011-12]. The Circuit Court failed to pass upon this matter.

No witnesses were offered by the prosecution to establish that there was any concealment of any kind with respect to the years involved from any "officer of the United States." The only witness upon whose testimony the proof of this charge must ultimately rest was the prosecuting revenue agent who, petitioners understand, was not an *officer* of the United States. The question of the sufficiency of the evidence on the charge of concealment was not mentioned or passed upon by the Circuit Court although assigned and argued at length in petitioners' briefs.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In failing to dispose of all assignments of error presented and argued by petitioners.

2. In sustaining the convictions of petitioners under the third count of each of the two indictments charging evasion of income tax for 1937.

3. In sustaining the imposition of double punishment for the same crime of conspiracy charged in each fourth count of the two indictments and in failing to reverse the conviction of petitioners under both fourth counts.

4. In holding that, for the purpose of sustaining the conviction of petitioners under the second count of both indictments, taxable income is realized, at the time of acquisition, by the mere purchase of real property for a cash consideration payable in instalments, notwithstanding there was no disposition of such real property.

5. In holding, for the purpose of sustaining the conviction of petitioners on the first and second counts of both indictments, that the advancement of the item of $134,000.00 constituted a loan.

6. In holding, in effect, that a taxpayer differs with the Commissioner of Internal Revenue or his agents at his peril and that if the theory of taxation adopted by such taxpayer is found to be incorrect, such error is evidence of a willful and felonious attempt to defeat and evade tax.

7. In holding that there was sufficient evidence to support convictions on all counts of both indictments.

8. In holding that the existence of a criminal conspiracy within the six-year period before the filing of an indictment may be established solely by evidence of occurrences prior to such six-year period.

9. In holding that petitioners failed to maintain adequate records.

10. In holding that the expressed desire to keep income taxes at a minimum constitutes evidence of a criminal intent to evade and defeat such taxes.

11. In failing to reverse the judgments of the District Court.

Reasons for Granting the Writs.

1. The decision of the Circuit Court in sustaining the conviction of petitioners under the third count of each indictment involving the calendar year 1937 has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

Petitioners were charged and convicted under each third count of feloniously attempting to evade $2,527.42 of Maxfield's and $2,365.29 of Wilton's income taxes for 1937 [R. 14, 41], by willfully failing and refusing to file any "income tax return" for the calendar year 1937 [R. 14-15, 41-42].[9]

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[9]The charge of failing and refusing to file any return for 1937 is groundless and untrue. The only evidence offered by the government to support this alleged failure and refusal was the testimony of Assistant Collector Williams who, when first called to the stand, testified that no income tax returns were filed by petitioners or their wives for 1937 [R. 249]. Thereafter when called by petitioners, Williams testified [R. 721]: "After I testified the other day in court, during a recess Mr. Steffes requested, *in the presence of Mr. Campbell,* that I make a further search in our office in Reno to determine whether there were any memoranda concerning the 1937 return. I did make such search and as a result of that search I discovered *for the first time* that the 1937 tentative returns, which were admitted as plaintiff's Exhibits 48, 49, 50 and 51, were on file in our office." In this connection, the prosecuting revenue agent testified [R. 482]: "Q. Take the year 1937, for instance, Mr. Claypoole, did you say you made an audit of the affairs of Maxfield and Wilton for 1937, is that right? A. I made an examination of the tax returns of Mr. Maxfield and Mr. Wilton for the year 1937. Q. And until I had Mr. Williams bring in those tentative 1937 returns the other day, you didn't know they were on file, did you, Mr. Claypoole?" Mr. Campbell: "Objected to immaterial, incompetent." The Court: "Sustained." Mr. Steffes: "Exception."

Petitioners kept their books and records and filed their income tax returns on the cash receipts and disbursements basis of accounting. The returns filed by petitioners and offered in evidence as government exhibits so show [R. 178, 196, 224, 233]. The prosecuting revenue agent admitted that he also used the cash basis in arriving at the conclusions testified to by him [R. 526]:

> "Q. When you made this examination, you made your conclusions as if they (petitioners) were on a cash basis, is that correct? A. Yes, sir."

It is undisputed that the existence of any tax for 1937 depends entirely upon whether the $97,459.47, which was actually received from the Colvers in 1935 and 1936, constituted taxable income in 1937.

The prosecuting revenue agent unequivocally stated:

> "If the profit which I figured of $97,459.47 on the Herman deal was not taxable income for the year 1937, then Maxfield and Wilton, according to my audit had a loss of $3,235.50 for that year. This profit of $97,459.47 came from the sale of Kellogg stock, which had been received from Dr. Colver and sold for approximately $250,000. That stock was received in 1935 and 1936" [R. 482].

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> "That stock was sold in 1935 and 1936, and the money was received by Maxfield and Wilton either in 1935 or 1936. *No part of it was received in 1937.* The last sale of stock was in 1936. So that none of the cash was received by the defendants from the sale of this stock in 1937" [R. 483].

As stated by the Circuit Court [Op. R. 1042], the revenue agent treated this $97,459.47 item as a long-term transaction and computed tax thereon on the completed contract basis.

There is no justification or excuse for thus arbitrarily isolating this transaction from all others occurring during the years in question and applying thereto the completed contract basis when, clearly, petitioners kept their books and reported on a cash basis. The only conceivable reason for doing this was to create a purported tax liability for 1937, when, in fact, a net loss was sustained in that year. A taxpayer is not obligated to use the completed contract basis. The applicable Treasury Regulations so provide: GCM 22682, 1941-1 C.B. 307; Tr. Reg. 94, Art. 42-4.

Moreover, the revenue agent disregarded and the Circuit Court wholly ignored the undisputed fact that the entire $97,459.47 had been devoted by Maxfield to the performance of his trust agreement with the Colvers, as well as the other Chiquita stockholders, to use this money for the purpose of placing the Chiquita mine on production, which was actually accomplished by July, 1936 [R. 728].

Thus, even under the completed contract basis, all money received from the Colvers ($250,395.15) had been entirely used by Maxfield in performing his trust agreement and, consequently, there remained therefrom no profit or taxable income. The felonies of which petitioners were convicted under the third counts depend entirely for their existence upon the accident of the revenue agent's having arbitrarily adopted a different basis, in treating the Colver $250,395.15, than the cash basis upon which he treated all other transactions. Had he consistently used the cash receipts and disbursements basis, he would have deter-

mined that the $97,459.47 was confineable to 1935 and 1936. He then would have found that there was a net loss for 1937.

The injustice of petitioners' convictions on the third counts is aggravated by the fact that after having filed tentative returns for 1937 and having prepared final returns which the revenue agent examined [R. 482], he advised them "as a friend" not to file their [final] returns for 1937. He further instructed them to inform the Collector of Internal Revenue at Reno, Nevada, of his advice to them, which they did in writing [R. 946-947].

The conviction of petitioners under the third counts, and affirmance thereof, is so shocking to every sense of moral and legal justice as certainly to require the intervention of this Court.

2. The decision of the Circuit Court [Op. R. 1039] with respect to the conspiracy counts of the two indictments is in conflict with the decisions of this Court in *Braverman v. United States,* 317 U. S. 49 and *Hirabayashi v. United States,* 320 U. S. 81.

The Circuit Court held [R. 1039], applying *Braverman v. United States, supra,* that a single crime of conspiracy was shown in the fourth counts of the two instant criminal prosecutions, which were tried together but concluded that the situation did not warrant reversal with respect thereto in either case because, under the rule of *Hirabayashi v. United States, supra,* petitioners were in no way prejudiced.

The *Hirabayashi* case involved but a single indictment containing two counts charging separate and distinct crimes. The second count, which this Court upheld, charged violation of a curfew law requiring the accused to remain in his residence between 8 p. m. and 6 a. m. The

first count charged that he failed to report to the Civil Control Station on two separate dates. Upon conviction under both counts two three-months' sentences were imposed, to run *concurrently*. This Court held (p. 105) that the conviction under the second count was "without constitutional infirmity." Consequently, both the conviction and sentence under this count were sustained irrespective of any claimed infirmity of the first count. The question of double jeopardy, or double punishment for a single crime, was not there involved. This Court held a reversal of the conviction and sentence under the first count was not necessary since no added punishment was inflicted thereby on the accused.

The Circuit Court, however, in attempting to apply herein the rule in the *Hirabayashi* case, held that petitioners were not prejudiced by the two unequal punishments which were inflicted on them because the aggregate penalties imposed on both conspiracy convictions for the same offense were within the maximum punishment prescribed for a single conspiracy.

But this Court did not lay down the rule in the *Hirabayashi* case that convictions under two counts should be sustained simply because the two sentences thereon taken together were within the maximum penalties prescribed for a single offense. Had the two three-months' sentences in the *Hirabayashi* case been ordered to run *consecutively*, or had the sentence on the first count (not passed on by this Court) been greater than the penalty inflicted under the second count, this Court undoubtedly would have considered and determined the questions raised in that case with respect to the first count. The Circuit Court has, therefore, erroneously established a precedent which, if permitted to stand, will nullify the constitutional guar-

antees under the Fifth Amendment against double jeopardy and double punishment for a single offense. The maximum penalties prescribed for a single crime of conspiracy are two years imprisonment and a $10,000 fine, or both. Under the Circuit Court's construction of the *Braverman* and *Hirabayashi* cases, if a defendant is sentenced to one year's imprisonment and a fine of $5,000 in one case, and to one year's imprisonment and a $5,000 fine in another case, for the same conspiracy offense, both jail sentences to run *consecutively*, the judgments in the two assumed cases ought not be reversed because the two sentences added together would not exceed the maximum penalty prescribed for a single conspiracy offense. Obviously this would be erroneous.

The Circuit Court has upheld herein the infliction of two different penalties for the same offense. Although the jail terms in the two cases are to run concurrently, there is the added penalty imposed on each petitioner of a $5,000 fine under Indictment No. 10,455. No fine is imposed on either petitioner under Indictment No. 10,456. It follows that the Circuit Court has held that the infliction of two unequal punishments for a single crime is proper. This holding is directly contrary to this Court's decision in the *Braverman* case wherein it held (p. 54) that "only the single penalty . . . can be imposed." Clearly, both fourth counts never should have been allowed to go to the jury. Both counts having been submitted to the jury, double jeopardy resulted and, by the imposition of unequal penalties thereon, petitioners were twice punished for the same offense.

It must be remembered that petitioners' position herein is far more favorable to them than was the position of the petitioners in the *Braverman* and *Hirabayashi* cases. In

each of those cases there was but a single criminal prosecution under a single indictment, whereas here there are two separate and distinct criminal prosecutions, each involving both petitioners, under two separate indictments. In the cited cases there was but a single judgment, whereas here separate judgments were entered in each case against each petitioner. In *Hirabayashi,* no question of double jeopardy or double punishment was involved. In *Braverman,* the question of double jeopardy because of the existence of another indictment, upon which allegedly the petitioner Wainer had pleaded guilty, was not passed upon because such other indictment was not in the record before the Court. This Court so stated. In the present case, double jeopardy affirmatively and conclusively appears. In *Hirabayashi,* both sentences were identical and ran concurrently, whereas here they are unequal.

The applicability of the rule in the *Hirabayashi* case essentially depends upon the existence, as a condition precedent, of a count which is not subject to a constitutional infirmity. Here, both fourth counts, by virtue of the two concurrent criminal prosecutions, are simultaneously and mutually subject to the same constitutional infirmity arising under the double jeopardy provision of the Fifth Amendment.

In conclusion, the *Hirabayashi* rule can be applied only to a case where separate and distinct crimes are charged. From the foregoing, it is clear that the Circuit Court incorrectly construed and improperly applied this Court's decisions in the *Braverman* and *Hirabayashi* cases, *supra,* and in so doing has created an irreconcilable conflict therewith.

3. The decision herein of the Circuit Court with respect to the punishment imposed on the conspiracy convictions

under the fourth counts of the two indictments is in conflict with the decisions of the United States Circuit Court of Appeals for the Seventh Circuit in *United States v. Anderson*, 101 F. (2d) 325, cert. den. 307 U. S. 625; *Miller v. United States*, 4 F. (2d) 228, cert den. 268 U. S. 692, and *Murphy v. United States*, 285 Fed. 801.

In *United States v. Anderson, supra*, two indictments were returned against the defendants, one charging a continuing conspiracy under Section 37 of the Criminal Code, to obstruct and retard the passage of the United States mails, in violation of Section 201 of the Criminal Code, and the other in two counts charging a conspiracy in violation of the Sherman Act, to obstruct the transportation in interstate and foreign commerce of passengers and freight. On each indictment each defendant was sentenced to the maximum punishment permitted by the conspiracy statute upon which the indictment was founded, the sentences to run consecutively. On appeal, the Seventh Circuit held (p. 333) that the consecutive punishments could not stand because there was but one conspiracy having as its objects not only the stoppage of transportation of coal but also interference with the transportation of the mails. Relying upon the statement of this Court in *Frohwerk v. United States*, 249 U. S. 204, 210, that "The conspiracy is the crime, and that is one, however diverse its objects," the court said (p. 333) "we cannot believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy . . .". It also relied upon its prior decisions in *Miller v. United States, supra*, and *Murphy v. United States, supra*.

In *Miller v. United States, supra*, the defendant, with others, was charged in one count with conspiring to transport unlawfully spirits removed from a bonded warehouse,

and in a second count with conspiring to remove spirits from a bonded warehouse. He was sentenced to imprisonment for two years and to pay a $10,000 fine on the first conspiracy count; on the second, he was sentenced to imprisonment for two years and to pay a fine of $5,000, the terms of imprisonment to be served consecutively. Thereupon, after stating that the evidence disclosed but a single conspiracy, the Court held that the sentence on count 1 could not be sustained. It said that "a single conspiracy, if covering the entire transaction, may not be split up into a plurality of offenses" (p. 230). The court accordingly modified the judgment by striking out the sentence on the first count (p. 232), that alleging a conspiracy to transport the alcohol. It will be observed that the Seventh Circuit struck out the greater of the two penalties.

In *Murphy v. United States, supra,* there arose the question whether Murphy could be lawfully sentenced upon two counts of an indictment, one of which charged him and others with conspiring to rob the mails, and the other with a conspiracy to have in their possession and to conceal the mail bags and proceeds thereof, secured through robbery, as charged in the previous count. The maximum sentence under the conspiracy statute had been imposed upon each count. In reaching the conclusion that Murphy could not be so punished because of the Fifth Amendment, which "protects all against double punishment for the same offense," the court (on petition for rehearing) modified Murphy's sentences by striking out the sentence imposed on the count charging conspiracy to conceal the goods secured through the robbery (pp. 817-818). Specifically, the court stated:

> "The evidence leaves no room for legitimate discussion. It conclusively establishes but one conspiracy.
> * * *

> "The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of a crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution. *The sentence on this count therefore cannot be sustained.*" (Italics supplied.)

The *Anderson, Miller* and *Murphy* cases, *supra,* establish the fundamental principle that where there exists but one conspiracy and, hence, but one crime, only a single penalty can be imposed. In applying this principle, where the sentences were unequal, as here, the Seventh Circuit held in the *Miller* case, *supra,* that the sentence on the count carrying the greater penalty should be stricken. In the instant cases, the Circuit Court has held that even though there be a single crime of conspiracy, two unequal penalties can be inflicted thereon provided such penalties in the aggregate "were within the maximum prescribed for a single conspiracy" [R. 1039].

If the conviction on the conspiracy count carrying the greater penalty of one year's imprisonment and a fine of $5,000 (Indictment No. 10455) is held, as in the *Miller* case, to be subject to a constitutional infirmity and, even though the convictions on all other counts of both indictments are affirmed, petitioners will be prejudiced by the additional fine of $5,000 unless the sentence in Case No. 10455 is set aside.

4. The Circuit Court has decided an important question concerning double jeopardy under the Fifth Amendment which has not been but should be settled by this Court.

Petitioners were twice put in jeopardy for the same offense of criminal conspiracy by being prosecuted therefor under each of the two separate indictments. Each indictment initiated a separate criminal prosecution.

Had petitioners been tried first under one indictment and then tried under the other indictment, there is no question but that petitioners would have been twice put in jeopardy. The Fifth Amendment makes no exception to the constitutional inhibition in cases where the two prosecutions are tried at the same time. Even though the two indictments are tried simultaneously by the same jury, an accused is subject to jeopardy under each indictment as soon as the jury is sworn and, therefore, he is twice put in jeopardy for the same offense.

Unquestionably, if petitioners had been brought to trial on Indictment No. 10,455 alone and, after the jury had been sworn, the action had been dismissed, the Fifth Amendment would have effectively prevented a subsequent trial under Indictment No. 10,456. If, where both prosecutions were being tried together, after the trial had commenced and the jury had been sworn, Indictment No. 10,455 had been dismissed, certainly petitioners would have been placed in jeopardy as to the offense of conspiracy charged in Indictment No. 10,455 since jeopardy immediately attached thereto when the jury was sworn.

In the instant case, each criminal prosecution was subject to the same "constitutional infirmity" under the Fifth Amendment. Therefore, not only should the sentences be set aside, but also the judgments of conviction under both fourth counts.

5. The Circuit Court has decided the present cases in a manner in conflict with the rule prescribed in *Maryland Casualty Co. v. Jones,* 279 U. S. 792, by failing and re-

fusing[10] to dispose of all errors assigned and argued by petitioners:

a. The Circuit Court failed to mention or decide whether the trial court erred in sustaining the government's objections to questions propounded to petitioner Wilton. Assignments of error XLVIII-1, 3, 4, 5 and 6, R. 1015-16. [See also Assignment XLVIII-7, R. 1014-15; see offer of proof, R. 799, 800.] The assignments referred to were first set forth in petitioners' brief as required by rule of court. They were likewise specifically argued in petitioners' opening brief, pp. 137-139, and their reply to the government's supplemental brief, pp. 16-19. Although the Circuit Court summarily disposed of the erroneous rulings of the trial court relating to questions propounded to government witness Claypoole [Op. R. 1046], it failed even to mention the assignments of error with reference to testimony attempted to be adduced by Wilton. One of the questions bore directly on the issue of whether or not a partnership existed between petitioners. The question as to whether a partnership existed between petitioners was one of the most important issues submitted to the jury, and petitioners were both prevented from testifying concerning the negotiations between them in which the terms and conditions of their relationship were fixed and determined. The other excluded testimony directly affected the market value of certain real property. The rejection of such testimony was greatly prejudicial.

b. The Circuit Court likewise failed to mention or decide whether the trial court erred in sustaining the

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[10]Its failure to dispose of all petitioner's assignments of error was specifically called to the Circuit Court's attention in a petition for rehearing (pp. 2-6), filed Saturday, January 12; denied Monday, January 14, 1946 [R. 1049].

government's objection to the question propounded by petitioners to the witness Mooney, material and relevant to the issue of alleged concealment. Assignment of Error XLII, R. 1011-12. The point was properly presented and was argued by petitioners in their opening brief, pp. 139-140, and in their reply to the government's supplemental brief, pp. 18-19. This is important since the issue of concealment as a material element of all the offenses charged was not passed upon by the Circuit Court. The indictments in every count charged that petitioners concealed information "from all proper officers of the United States." Mooney was Chief Field Deputy Collector of Internal Revenue in Nevada. [R. 710.]

c. The Circuit Court failed to mention or decide whether there was any substantial evidence to prove the charges of concealment contained in each account of both indictments. Assignments of Errors LVI, LVII, LVIII, LIX, LX, LXI, LXII, and LXVII, R. 1019-20; 1028, included the concealment element, among other things, as part thereof. Petitioners showed in their opening brief, pp. 31-47, that all the evidence affirmatively disproved this material element of the crimes charged. It is axiomatic that every alleged material element of a crime must be proved. Petitioners' contentions in this respect were not controverted by the government in its briefs.

d. The Circuit Court failed to mention or decide whether the crime of conspiracy charged in the fourth count of each indictment was barred by the six-year statute of limitations. Assignment LXVII-3, R. 1028. This point was separately raised and argued. In their opening brief, pp. 112-113, petitioners demonstrated that even if a conspiracy existed in 1933 or 1934, it was completely abandoned prior to June 14, 1935. The government wholly

failed in its briefs to point out any evidence whatsoever showing the continuation of the alleged conspiracy after June 14, 1935, or to any time within the six-year period prior to the filing of the indictments on January 29, 1942. The only comment made by the government was in a footnote (Br. 29) in which it stated: "IF the conspiracy was a continuing one, there is no merit in appellants' claim that its prosecution was barred by the statute of limitations." *United States v. Kissel,* 218 U. S. 601, cited by both parties, clearly holds that proof of the abandonment of a conspiracy more than six years before the filing of an indictment constitutes a complete defense. The Circuit Court, in its opinion [R. 1045] refers to an alleged conspiracy by petitioners, "to keep two sets of books—one for exhibition purposes only * * *." There is not even the slightest evidence that two sets of books were ever kept by petitioners. The alleged conspiracy was, therefore, abandoned at its very inception in 1933, which was more than 8 years before the filing of the indictments on January 29, 1942.

The question relating to the bar of the statute of limitations was separate and distinct from the question as to whether evidence of events occurring more than six years before the filing of the indictments was admissible. This latter question, relating solely to the admissibility of evidence relative to events allegedly occurring prior to commencement on January 29, 1936, of the six-year limitation period, was covered by Assignments VI, VII, VIII to XIV, R. 997-1000, and was argued on pp. 114-115 of petitioners' opening brief. The Circuit Court erroneously determined [R. 1046] the question concerning the admissibility of such evidence. The determination on this latter question of evidence did not expressly or impliedly

include a decision by the Circuit Court on the question of the bar of the statute of limitations.

6. The Circuit Court's decision is in conflict with the pronouncements of this court in *United States v. Isham,* 84 U. S. 728, and *Gregory v. Helvering,* 293 U. S. 465, 469, relative to a taxpayer's right to minimize his taxes.

In the *Isham* case, *supra,* which was a criminal prosecution for violation of the Revenue laws, this Court stated:

> "* * * if a device is carried out by means of legal forms, it is subject to no legal censure."

And in the tax case of *Gregory v. Helvering, supra,* this Court, citing the *Isham* case, reiterated this principle in the following language:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, by means which the law permits, cannot be doubted."

The Circuit Court here held that evidence to the effect that testimony that petitioners "anticipated the receipt of a large income from sales of stock and desired to keep their taxes at a minimum" [R. 1045] constituted competent evidence of a willful or wrongful intent.

In view of the altogether just principle laid down in *United States v. Isham* and *Gregory v. Helvering, supra,* no such dangerous standard as is prescribed by the Circuit Court to determine the good faith of a taxpayer, should be permitted to stand.

7. The decision of the Circuit Court is in conflict with the decision of this court in *U. S. v. Kissell,* 218 U. S. 601, with respect to the admissibility of evidence of events occurring more than six years before the filing of an indictment.

The Circuit Court erroneously held [R. 1046] that evidence of occurrences prior to the six-year period before the filing of an indictment, is admissible in proof of the existence of a criminal conspiracy within such six year period, citing *United States v. Kissell, supra.* The Circuit Court incorrectly applied the legal principles contained in that decision. On the face of the Circuit Court's opinion, it distinctly appears that a criminal conspiracy within the six-year period before the filing of an indictment, can be proved solely by evidence of occurrences before that period. The *Kissell* case does not so hold. Evidence of prior occurrences is admissible only if there is *additional* evidence of the continuation of the conspiracy into the six-year period before the filing of the indictment. In the instant cases, there was no such evidence. The Circuit Court did not even discuss in its opinion whether there was or was not evidence of a continuing conspiracy.

8. The Circuit Court has erroneously decided another important question which has not been but should be settled by this Court. It has erroneously held [R. 1041-44], in effect, that the mere disagreement of a taxpayer with the government on several disputed substantial items of alleged income constitutes sufficient evidence to sustain a conviction of tax evasion as charged in the first three counts of both indictments. Such ruling is clearly erroneous and contrary to every concept of moral and legal justice.

The four large items [$134,000.00; $97,000.00; $86,000.00 and $93,000.00, Op. R. 1041-44] cited by the

Circuit Court and relied on by the government as constituting alleged income which was not reported, are still the subject of civil litigation between petitioners and the Commissioner of Internal Revenue. No hearing has yet been had on petitioners' petitions for redetermination in the Tax Court with reference to those items. Petitioners contended and unsuccessfully requested the trial court to instruct the jury [Assignment LXIII, R. 1025, 987-988] that they had the right to contend adversely to the government until the matter had been finally decided by the court of last resort. It was recently held in *Fairfax, etc.*, 5 T. C. No. 254, that a taxpayer even if he is wrong does not claim the benefits of a tax law at his peril. The Circuit Court nowhere in its opinion holds that the contentions of petitioners with reference to these four large items were absurd or unsound on their face. It merely assumes that if they were wrong *civilly* they were likewise, guilty ***criminally.***

The court's decision in holding that the payment of $134,000 to Chiquita Mining Co. Ltd. constituted a loan conflicts with its own decision in *Northern Mining Corp. v. Trunz,* 124 F. (2d) 14, cert. den. 316 U. S. 664 and numerous decisions by other Circuit Courts to the same effect. Contrary to the statement in its opinion [R. 1041-42], the written agreement [Defendant's Exhibit F, R. 724-43] conclusively shows that there is no unconditional obligation on the part of the mining company to repay this amount to Maxfield. Any repayment which Maxfield may receive is by the terms of said agreement dependent

upon numerous conditions and contingencies,[11] which might never occur. An unconditional obligation to repay the amount of a loan is an indispensable characteristic of its very existence in the first instance.

Northern Mining Corp. v. Trunz, supra.

Unquestionably, petitioners' position on this point is sound. Yet this precise question was not considered by the Circuit Court in its opinion. That court's casual and incomplete treatment of this important question will seriously prejudice petitioners' rights in their civil cases pending before the Tax Court. It entirely failed even to comment on the undisputed evidence that when Maxfield received the $134,000 in the first instance, the money was impressed with a trust under which he was obligated to pay it to the mining company in order to put the mine on production. Had he diverted this money to his own use, contrary to his agreement with the miners, Dr. and Mrs. Colver and the other stockholders, he would have been guilty of embezzlement. In these criminal cases, the

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[11](a) Maxfield expressly waived any right of repayment except out of the proceeds from the sale of ore, etc. taken from the mining properties themselves; (b) Repayment out of such proceeds from ore, etc., depends upon the existence of ore having value; (c) Such repayment likewise depends upon the ability of the mining company to receive more proceeds from such ore, etc., than is necessary to cover the costs of producing operations; (d) Repayment is likewise dependent upon the mining company receiving more than $20,000 from such proceeds each month; (e) Repayment is contingent upon the mining company having a cash reserve of $50,000; and (f) Maxfield's right to operate the mining properties in order to receive repayment therefrom is likewise contingent upon the mining company ceasing operations. A profitable production by a mining company is never a certainty. It always involves numerous unforeseen contingencies.

Circuit Court has held Maxfield guilty of a felony for treating this money as a trust fund and performing the terms and the conditions of his trust to the letter.

The next item, of $97,000 has already been shown, *supra,* by petitioners not to have been taxable income.

As to the item of $86,000, petitioners contended that the property involved therein had no readily realizable market value and, therefore, treated this item in the same manner as they and the prosecuting revenue agent treated certain Battle Creek Gas Co. stock which, likewise, according to the revenue agent had no "readily realizable market value" in the year when acquired. Petitioners consistently in all these similar transactions involving property acquired in an exchange, followed the rule that gain or loss should be reported not in the year of its acquisition but in the year of its sale.

Petitioners' position with reference to the item of $93,000 hereinbefore discussed is so obviously sound that no further explanation is necessary. A purchase of property for a cash consideration payable in installments has never been held to be a taxable transaction. Furthermore, the revenue agent wholly failed in determining the alleged net profit relative to this item to allow the full cost basis therefor, even on the assumption that the acquisition of property for money results in tax.

Motions for bills of particulars were timely made by petitioners and should have been granted, but were not, contrary to *Singer v. United States,* 58 F. (2d) 74; C. C. A. (3d). In attempting, under this handicap, to refute

the tax evasion accusations, petitioners were compelled to adopt the procedure followed in the *Singer* case and to account for the difference in the amount of taxable income reported by them and that which the government claimed should have been reported. In their briefs before the Circuit Court petitioners accounted for practically the entire amount of more than $500,000.00 without even the benefit of a bill of particulars.

In conclusion, it is respectfully submitted that for all of the reasons set forth above this petition on behalf of both petitioners for a writ of *certiorari* in each of the two cases should be granted.

February 9, 1946.

Respectfully submitted,

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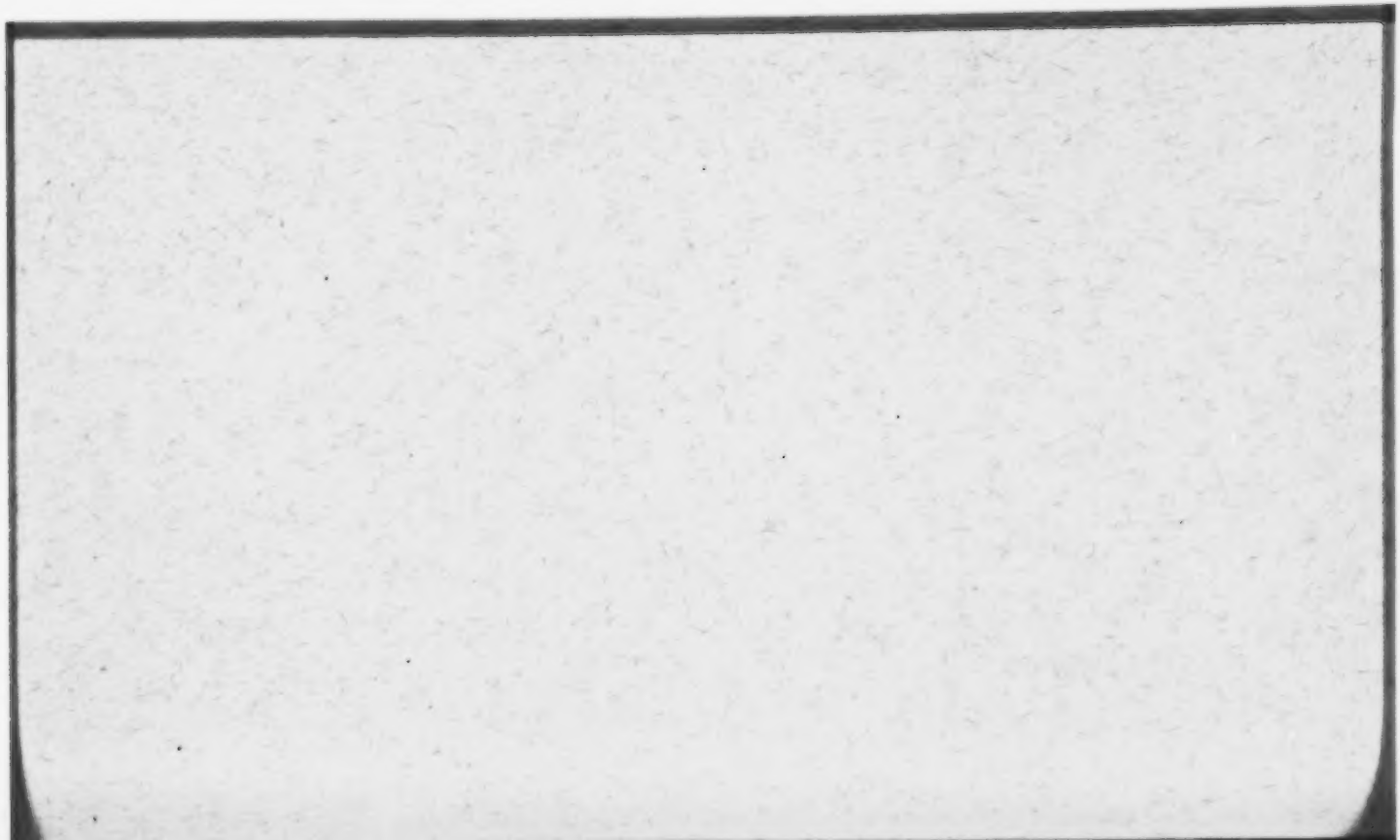

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1946.

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2-9-46—60